Mutual trust and confidence in employment contracts

Rebecca Gall reports on *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

A five member bench of the High Court held unanimously that there is no implied term of mutual trust and confidence in employment contracts.

Background facts

Mr Stephen Barker was employed by the Commonwealth Bank of Australia (CBA) from 1981 until he was made redundant in 2009. At the time of his termination he was employed as an executive manager in Adelaide.

On 2 March 2009 Mr Barker was informed his position was being made redundant but that it was CBA's preference he be redeployed within the bank. On that same day he was required to clear out his desk, hand in his keys and CBA-issued mobile phone and not to return to work. His access to his CBA email account, voicemail and intranet also was terminated.

Over the following weeks, CBA's recruitment consultant attempted to contact Mr Barker via his CBA mobile and email in relation to redeployment opportunities. However, having been deprived of access to these he did not receive the communications until an email was forwarded to his personal email address at the end of March. About a week later, Mr Barker's employment was terminated by reason of redundancy.

Claim

Mr Barker brought proceedings in the Federal Court of Australia alleging that in accordance with his written employment contract and the CBA's Redeployment Policy, CBA:

- would maintain trust and confidence with him; and
- would not do anything likely to destroy or seriously damage the relationship of trust and confidence without proper cause for doing so.[1]

Mr Barker also alleged that CBA had breached the implied term of mutual trust and confidence and this resulted in him being denied an opportunity of redeployment and thereby being retained by CBA.[2]

Issue

The question before the High Court was whether, under the common law of Australia, employment contracts contain a term that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them.[3]

Decision

The High Court overturned the decisions of the Federal Court and of the full court and held that a term of mutual trust and confidence was not implied by law into every employment contract as such a step is beyond the legitimate law-making function of the courts.[4]

In reaching this conclusion in a joint judgment French CJ, Bell and Keane JJ discussed three key issues: the concept of 'necessity', comparison with the United Kingdom and the limits on judicial law-making.

Necessity

Central to the decision was the conclusion that the implication of a term of mutual trust and confidence is not 'necessary' in the sense that would justify the exercise of the court's judicial power in a way that may have a significant impact upon employment relationships and the law of contract of employment in Australia.[5]

At [37] French CJ, Bell and Keane JJ stated:

> The implied term of mutual trust and confidence, however, imposes mutual obligations wider than those which are 'necessary', even allowing for the broad considerations which may inform implications in law. It goes to the maintenance of a relationship.

In relation to necessity, their Honours observed that it may be defined by reference to what 'the nature of the contract itself implicitly requires' and may be demonstrated by the futility of the transaction absent the implication but is not satisfied by demonstrating the reasonableness of the implied term.[6]

Justice Kiefel, who delivered separate reasons, similarly found that such a term was not necessary. At [108] her Honour concluded:

> Contracts of employment are not rendered futile because of the absence of a term to this effect. To the contrary, it would not be possible for all employers to give effect to such a term. This tells against the application of such a requirement as a universal rule. It cannot be said to be 'necessary' in the sense described earlier in these reasons.

In addition, her Honour observed that such a term was not necessary in this particular case given a particular term (clause 8) in the written employment agreement.[7]

One aspect of her Honour's reasoning which was not present in the joint judgment was her Honour's consideration as to whether there was a legislative 'gap' which the common law can fill. Justice Kiefel considered the current unfair dismissal legislation which places restrictions on when an employee can bring a claim of unfair dismissal where the termination

of the employment is because of redundancy. In this case, Mr Barker was unable to make a statutory claim because his wages exceeded a certain amount.

Her Honour stated at [96]:

> Contrary to the respondent's contention, this does not create a gap which the common law can fill. In *Johnson v Unisys*, Lord Hoffmann noted that certain classes of employees were excluded from the protection of the legislation there in question. Yet, as his Lordship observed, it was the evident intention of the Parliament that the statutory remedy provided be limited in its application. Likewise, the Australian Parliament has determined what remedies are to be provided for unfair dismissal and it has determined who may seek them. (Footnotes omitted.)

Rejection of UK approach in Australian context

The majority of the full court of the Federal Court had relied on the House of Lords decision in *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)*[1998] AC 20 at 34 per Lord Nicholls of Birkenhead in finding there was an implied term of trust and confidence referrable to all contracts of employment.

However, French CJ, Bell and Keane JJ rejected such reliance on this decision and concluded that this was not an appropriate occasion for the High Court to follow the approach taken by the courts in the United Kingdom. In so finding, their Honours noted that the regulatory history of the employment relationship and of industrial relations in Australia differs from that of the United Kingdom.

At [18] their Honours said:

> Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must 'subject [foreign rules] to inspection at the border to determine their adaptability to native soil'. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law. (Footnote omitted.)

Limits on judicial law-making

French CJ, Bell and Keane JJ held that importing a term of mutual trust and confidence into employment contracts would trespass into the province of legislative action in the Australian context, which is not appropriate for the judicial branch of government. Their Honours stated that:

> The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves.[8]

Another concern was that the obligation had a 'mutual aspect' to it and had the potential to apply to employees in circumstances where their conduct was neither intentional nor negligent and not a breach of their existing duty of fidelity but which caused serious disruption to the conduct of their employer's business.[9]

French CJ, Bell and Keane JJ concluded by making it clear that they were not to be taken as commenting on or considering the application of good faith in contracts.[10]

Endnote)

1. At [9] per French CJ, Bell and Keane JJ.
2. At [10] per French CJ, Bell and Keane JJ.
3. At [15] per French CJ, Bell and Keane JJ.
4. At [1] per French CJ, Bell and Keane JJ; at [108] Kiefel J agreed such a term was not necessary; at [119] Gageler J wrote a short separate judgment and agreed with the majority's reasons.
5. At [36] per French CJ, Bell and Keane JJ; at [108] per Kiefel J; at [119] per Gageler J.
6. At [36] per French CJ, Bell and Keane JJ.
7. At [109] per Kiefel J.
8. At [40] per French CJ, Bell and Keane JJ.
9. At [40] per French CJ, Bell and Keane JJ.
10. At [42] per French CJ, Bell and Keane JJ; at [107] per Kiefel J; Gageler J made no comment on this issue in his short reasons.